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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

MANUFACTURERS ASSOCIATION OF TRI-COUNTY, *et al.*,
Petitioners

v.

JAMES W. KNEPPER, JR., *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners submit this Supplemental Brief, pursuant to Rule 22.6 of the Court's Rules, in response to the Brief for the United States as Amicus Curiae submitted on September 2, 1987, by invitation of the Court.[1] This Supplemental Brief is necessary because the Solicitor General's conclusion that certiorari should be denied in this case is based largely upon recent developments not previously addressed by the parties, and in particular on the Occupational Safety and Health Administration's ("OSHA") issuance of a revised and expanded Hazard Communication Standard subsequent to the filing of our petition and reply.

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[1] Petitioners refer the Court to the Petition for Writ of Certiorari at i-ii and n.1 for a listing of parents, subsidiaries and affiliates of corporate parties pursuant to Rule 28.1 of this Court.

ARGUMENT

The Solicitor General agrees with Petitioners' legal position that the decision of the United States Court of Appeals for the Third Circuit below is in error. He recognizes that Congress, in enacting Section 18(b) of the Occupational Safety and Health Act of 1970 ("OSH Act"), 29 U.S.C. § 667(b), preempted any state laws "relating to" the subject of a federal standard that have not received federal approval as part of a state plan. Brief for the United States at 11. Most important, he agrees with Petitioners that the Court of Appeals improperly upheld any provisions of the Pennsylvania Worker and Community Right-to-Know Act [2] that could be viewed as serving some other non-occupational objective in addition to their occupational safety and health functions. *Id.* at 13-14. The Court of Appeals' decision, as the Solicitor General states, "will undoubtedly cause some confusion concerning the controlling legal standards for federal preemption of state right-to-know statutes and may impose additional burdens on chemical manufacturers and manufacturing employers." *Id.* at 14.

Nevertheless, the Solicitor General concludes that the Court should deny certiorari because of two recent developments—OSHA's expansion of the Hazard Communication Standard to cover the nonmanufacturing sector announced in August 1987 [3] and Congress' enactment of the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA").[4] Neither of these events, as the Solicitor General admits, moots the issues presented in this case. Instead, he argues that they counsel denial of certiorari for purely prudential reasons. Brief of the United States at 15, 17. We respectfully submit that the

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[2] Pa. Stat. Ann. tit. 35, §§ 7301-7320 (Purdon Supp. 1986).

[3] 52 Fed. Reg. 31,852 (1987).

[4] 100 Stat. 1728-58. This statute was enacted as Title III, §§ 300-330, of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (Oct. 17, 1986).

Solicitor General, while correct in asserting that the Court of Appeals' decision was wrong as a matter of law, is clearly incorrect in his evaluation of the consequences of the recent developments upon which he relies.

A. The Expanded Hazard Communication Standard Increases the Need for Review

OSHA's expansion of the Hazard Communication Standard to nonmanufacturing employers, to which the Solicitor General evidently attaches the greatest weight, actually strengthens, rather than weakens, the case for granting certiorari.

By expanding the scope of the Hazard Communication standard, OSHA believed that it had "significantly expand[ed] the area in which state and local laws will be preempted." 52 Fed. Reg. 31,860. According to OSHA, this is desirable because a "uniform" federal Standard will benefit companies engaged in interstate commerce by preempting "different and potentially conflicting State and local laws." *Id.* at 31,857. The Solicitor General observes that OSHA's action should "leave little room for states to regulate *any* occupational hazard communication without obtaining OSHA approval." Brief of the United States at 15 (emphasis in original). We entirely agree with this statement of the law. But what the Solicitor General fails to recognize is that the expansion of the Standard to reach all employers cannot mitigate the holding of the Court of Appeals concerning the scope of preemption for covered employers. Instead, the Court of Appeals' decision, if left standing, will change the Solicitor General's "little room" to wide open spaces for state regulation.

The central issue in this case is whether, as the Court of Appeals held, the existence of any purpose in addition to workplace protection permits a state to continue to regulate in an area where it would otherwise be preempted by an OSHA standard. The Court of Appeals

has opened the door to easy circumvention of the congressional preemption scheme by allowing states to avert federal preemption merely by proclaiming that their statutes or regulations, although clearly relating to the workplace, also serve some other purpose.[5] The greater scope of preemption under the expanded Standard simply enlarges the area in which the Court of Appeals' decision invites the states to subvert the intent of Congress and OSHA by adding non-occupational purposes to their right-to-know laws rather than participating in the state plan process. Far from reducing the practical need for this Court to review the Court of Appeals' decision, OSHA's expansion of the Standard has made that review more critical than ever.

B. The Federal Community Right-to-Know Law Does Not Affect the Importance of Preemption Under the OSH Act

Likewise, the new federal Emergency Planning and Community Right-to-Know Act affords no basis for the Court to decline to consider a case such as this which is otherwise worthy of review. EPCRA provides a federal framework for the provision of hazardous substance information to communities, but nothing in the language of EPCRA or its legislative history purports to authorize state or local laws that would be preempted by Section 18(b) of the OSH Act and OSHA standards. EPCRA is thus irrelevant to the issue presented in this case:

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[5] The Solicitor General apparently assumes that the numerous state right-to-know statutes presently in force were principally enacted to fill the nonmanufacturing occupational gap where OSHA had yet to regulate, and that the states will now abandon their statutes as redundant. But Pennsylvania's law, like that of several other states, *see* Brief of Amici Curiae Chemical Manufacturers Association *et al.* at 14 n.30 and Appendix, was specifically enacted to regulate both the manufacturing and nonmanufacturing sectors even after the original OSHA Standard covering manufacturing employers had been adopted, thus contesting rather than complementing the limits of exclusive federal authority.

whether state statutory and regulatory requirements concerning workplace protection can escape preemption because they are also said to advance some non-occupational purpose.

The Solicitor General recognizes that the Court of Appeals wrongly allowed such dual-purpose state requirements to be enforced, and does not assert that EPCRA allows a state to do what would otherwise be preempted under the OSH Act.[6] Nevertheless, the Solicitor General suggests that this Court should defer action because states may reexamine their right-to-know laws due to EPCRA "with an eye toward establishing federal-state harmony." Brief of the United States at 17. Whether state requirements are relatively harmonious with or divergent from EPCRA, however, is beside the point. No state requirements can escape preemption under Section 18 of the OSH Act if they also relate to an issue covered by an OSHA standard. In sum, EPCRA does not lessen the need to determine the scope of preemption where states have asserted commingled occupational and community purposes, and it affords no reason why this Court should allow what the Solicitor General characterizes as an erroneous and burdensome decision to stand.

C. The Issues Are Ripe for This Court's Review

The Solicitor General believes that the expanded Hazard Communication Standard and EPCRA may prompt the states to undertake some review of their own right-to-know laws. But this only emphasizes the importance of reviewing the Court of Appeals' decision now. Whatever the states may do can only benefit from this Court's guidance as to the proper scope of preemption under the

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[6] OSHA, discussing EPCRA in the preamble to the expanded Hazard Communication Standard, indicated only that employers would have certain increased responsibilities due to the interplay of EPCRA and the Standard, and did not suggest that EPCRA bears any relation to the Standard's preemptive effect. 52 Fed. Reg. 31,859-60.

OSH Act. Nothing will be gained by allowing the states to proceed under the illusion that the approach taken by the Court of Appeals below is correct. To the contrary, by allowing the Court of Appeals' decision to stand, the Court would be encouraging states to engage in extensive legislative activity based upon a misapprehension of the law and would be setting the stage for even more litigation later.

The Government here expresses no more than a pious wish that the states will voluntarily cease their attempts to legislate in areas covered by the OSHA Standard without approval by OSHA. That wish is unlikely to come true so long as the Court of Appeals' decision remains in force. That decision has so altered the judicial landscape that to deny review would increase confusion in the law and multiply the burdens on interstate commerce that Congress in the OSH Act sought to prevent.

CONCLUSION

For the reasons stated herein and in our petition and reply brief, the Petition for Writ of Certiorari in this case should be granted.

Respectfully submitted,

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